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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID M. THIMMES,

Defendant and Appellant.

2d Crim. No. B210904
(Super. Ct. No. NA076325)
(Los Angeles County)

David Thimmes appeals from the judgment entered following his conviction by a jury of making a criminal threat (Pen. Code, § 422)¹ and stalking. (§ 646.9, subd. (a).) Appellant admitted allegations of two prior prison terms (§ 667.5, subd. (b)) and one prior serious or violent felony conviction within the meaning of the "Three Strikes" law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) At the time of sentencing, the prosecutor informed the court that only one of the prior prison terms was valid. Appellant was sentenced to prison for eight years, four months. Appellant contends that the evidence is insufficient to support his convictions. We affirm.

Facts

During the night of August 13, 2007, Araceli Rossi (Araceli) was driving home. While Araceli was making a left turn at an intersection, she heard appellant angrily yell, "Hey." (RT 332) Appellant was driving another vehicle in the same intersection.

¹ All statutory references are to the Penal Code.

Araceli drove to the cul-de-sac where she lived and parked in her driveway. Appellant followed her home. Araceli "ducked down" inside her vehicle to hide from him. While inside her vehicle, she saw appellant drive by. Araceli entered her home and saw appellant drive by several more times. She "was really scared because obviously . . . he was looking for [her]."

Later that night, Araceli left to take her son to work. While Araceli was inside her vehicle, appellant "drove very slowly next to [her] vehicle and just had this smirk on his face." Araceli contacted the police.

The police stopped appellant, and Araceli "thought that was the end of it." But on October 26, 2007, appellant left a note on the windshield of Araceli's vehicle while it was parked in her driveway. The note stated, "Tess, I love you. Kiss." As appellant was walking toward the driveway to leave the note, he made eye contact with Araceli's son, J.R. Appellant stared at J.R. with "a scary face."

Later that same day, J.R. and his sister drove out of the cul-de-sac to search for appellant. J.R. saw appellant's vehicle behind them. Appellant drove alongside J.R.'s vehicle. Appellant and J.R. made eye contact.

On October 27, 2007, appellant left a second note on Araceli's windshield while it was parked in her driveway. The note stated, "Tess, I love you. Can I talk to you? It will help us. So can we talk and so forth. All I live for is to talk to you."

On October 28, 2007, Araceli's husband, George Rossi (George), and J.R. were driving home when they saw appellant's vehicle. George pulled his vehicle next to appellant's and yelled, "What the fuck are you coming around my house for?" Appellant replied "sarcastically, 'I'm not coming around your house.'" George threw an ice cream cone at appellant. It missed him but landed inside his vehicle. Appellant said to George, "I'm going to fuck you up." Appellant picked up the ice cream cone, threw it at George's vehicle, and drove away.

George was scared. He considered appellant's statement to be a threat. He "thought [appellant] was going to pull out a gun or something." George drove home.

On October 30, 2007, a neighbor of the Rossis saw a vehicle in the neighborhood that matched the description of appellant's vehicle. George saw appellant in the evening on November 1, 2007. George was driving home, and appellant was driving away from George's home. George telephoned the police. George testified, "I felt he was coming around to stalk us, my wife and my whole family." In view of appellant's previous threat, George "was thinking that maybe [appellant] has a gun in his car or he's coming around to look at me."

On November 1, 2007, the police arrested appellant and searched his vehicle. The police found notes beginning with the word, "Tess," binoculars, and a Google map printout showing that the distance between appellant's residence and the Rossis' home was about 1.7 miles.

Appellant was questioned by the police. Appellant said that he had told George that he "was going to beat him up." Appellant also said that, about a month before his arrest, he had been "pulled over by the cops" for "following and scaring a lady." Appellant denied leaving notes on Araceli's car. He was shown the notes found on her car and admitted writing them. But he insisted that the police had recovered these notes during the search of his own vehicle. Appellant said that his former wife's nickname was "Tess."

Standard of Review

"[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence that is reasonable, credible and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) "Reversal . . . is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 422: Making Criminal Threats

The violation of section 422 was based on appellant's threat to George, "I'm going to fuck you up." To prove a violation of section 422, the prosecution must establish the

following five elements: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]"² (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Appellant contends that the evidence is insufficient to establish these five elements. He characterizes his confrontation with George as "nothing more than an exchange of profanity and a display of male 'chest thumping'."

"[T]he meaning of the threat . . . must be gleaned from the words and all of the surrounding circumstances." (*People v. Butler* (2000) 85 Cal.App.4th 745, 753.) "[I]t is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422. [Citations.]" (*Id.*, at pp. 753-754.)

Considering all of the surrounding circumstances, a reasonable trier of fact could conclude that the elements of a violation of section 422 had been proved beyond a reasonable doubt. George was Araceli's husband, and this fact should have been evident to appellant. It is reasonable to infer that appellant regarded George as his chief rival for

² Section 422 provides in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

Araceli's affection and the major obstacle to his goal of developing a romantic relationship with her. George confronted appellant and yelled, "What the fuck are you coming around my house for?" George's statement clearly implied a demand to stop "coming around" his house. It is reasonable to infer that this demand infuriated appellant, who had professed his love for Araceli and had told her, "All I live for is to talk to you." Appellant lied by "sarcastically" denying that he had been "coming around" George's house. Appellant's fury intensified when, in response to his denial, George threw an ice cream cone at him. It was at this point that appellant threatened to "fuck [George] up." Appellant construed his statement as a threat to inflict great bodily injury. He admitted to the police that he had told George that he "was going to beat him up." Although appellant drove away from the scene of the confrontation, he had the ability to carry out his threat because he knew where George lived.

We reject appellant's contention that the corpus delicti rule precludes consideration of his admission that he had told George that he was going to beat him up. Pursuant to this rule, the "corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant. [Citations.] The elements of the corpus delicti are (1) the injury, loss or harm, and (2) the criminal agency that has caused the injury, loss or harm. [Citation.] . . . A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient [to establish the corpus delicti]." (*People v. Wright* (1990) 52 Cal.3d 367, 403-404.) Here the corpus delicti of making a criminal threat was established independently of appellant's extrajudicial admission.

Accordingly, substantial evidence supports the elements that appellant willfully threatened to inflict great bodily injury on George, that he made the threat with the specific intent that it be taken as a threat, and "that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.' " (*People v. Toledo, supra*, 26 Cal.4th at p. 228.) "The use of the word "so" indicates that unequivocality, unconditionality,

immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 340.)

Substantial evidence also supports the element that the threat caused George to be in sustained fear for his safety. George testified that, at the time appellant made the threat, he "thought [appellant] was going to pull out a gun or something." When George saw appellant several days later, he "was thinking that maybe [appellant] has a gun in his car or he's coming around to look at me." George's fear for his safety led him to call the police. Under the circumstances, this fear was reasonable.

Section 646.9: Stalking

Section 646.9, subdivision (a), provides: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking" Appellant contends that the evidence is insufficient to support the "credible threat" element. " '[C]redible threat' " means a verbal or written threat, . . . or a threat implied by a pattern of conduct or a combination of verbal [or] written . . . statements and conduct . . . made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat." (*Id.*, subd. (g).)

Appellant is wrong in maintaining that "the 'credible threat' ' . . . must be made with the specific intent to place the victim in a reasonable fear of death or great bodily harm.' " (AOB 20) Section 646.9 used to provide that a credible threat " 'must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.' [Citation.]" (*People v. Carron* (1995) 37 Cal.App.4th 1230, 1238.) "[S]tatutory

amendments have modified the 'credible threat' element to require that the target of the threat need only fear for the target's safety or that of his or her family while deleting any requirement that the threat be 'against the life of, or [threaten] great bodily injury to' the target. (See Stats.1994, ch. 931, § 1.)" (*People v. Zavala* (2005) 130 Cal.App.4th 758, 767.)

Substantial evidence supports the credible threat element. A reasonable trier of fact could find beyond a reasonable doubt that appellant's pattern of conduct implied a threat made with both the apparent ability to carry it out and the intent to place Araceli in reasonable fear for her safety and the safety of her family. Appellant clearly indicated that nothing would stop him from achieving his goal of developing a romantic relationship with Araceli. He knew that Araceli feared him and wanted him to stay away from her. On August 13, 2007, appellant was stopped by the police because of Araceli's complaint. After his arrest on November 1, 2007, appellant told the police that he had been stopped for "following and scaring a lady." Despite the warning by the police on August 13, 2007, appellant continued his pursuit of Araceli. He drove to Araceli's home and left notes professing his love for her on the windshield of her car. He stared at her son, J.R., with "a scary face." When George confronted appellant and demanded an end to the harassment of his family, appellant threatened to physically harm him. Despite George's demand, appellant returned to Araceli's neighborhood a few days later.

Moreover, appellant's lies about his conduct evidenced a consciousness of guilt. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1135-1136.) Appellant lied to George when he denied "coming around" George's house. After his arrest, appellant lied to the police when he denied leaving notes on Araceli's car.

Appellant's threats caused Araceli to fear for her safety and the safety of her family. Araceli testified: "[I]t has been terrorizing." "I was always looking over my shoulder. I would not go home unless someone was home." She installed an alarm system in her home, took "self-defense courses," and "sought some counseling." When she learned of appellant's threat to physically harm George, she was "fearful because now he has confronted my husband, and my child was in the car."

In view of appellant's threat to "fuck [George] up," Araceli's fear for her family's safety was reasonable. So was her fear for her own safety: "[I]t is a sad truth, and one commonly reported, that persons such as appellant, in the grips of an obsession, have killed or harmed the object of that obsession, even while maintaining that they have no desire to cause harm." (*People v. Falck* (1997) 52 Cal.App.4th 287, 298.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Charles D. Sheldon, Judge
Superior Court County of Los Angeles

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